



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 3, 1996

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-2290

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 102135.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for "copies of all written material, including correspondence, notes, memoranda and telephone transcripts, between Waste Control Specialist, their representatives and any other party and the TNRCC staff and/or its commissioners concerning Waste Control Specialists' potential treatment, storage, and disposal of U.S. Department of Energy or U.S. Department of Defense low level radioactive waste and/or mixed waste at Waste Control Specialists' Andrews County facility. . . . [and] a copy of the draft report and any subsequent reports prepared by TNRCC staff for the TNRCC's executive director concerning Waste Control's intentions of treating, storing and disposing of federal low level radioactive waste and/or mixed waste in Texas." You have submitted the requested information and assert that it is excepted from required public disclosure based on sections 552.107(1) and 552.111.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* Information created for an agency by outside consultants may be within section 552.111 when the information was created by persons acting at the request of the governmental body and performing a task within the authority of

the governmental body. See Open Records Decision No. 631 (1995). Finally, section 552.111 applies to a document that is a genuine preliminary draft since a draft necessarily represents the advice, opinion, and recommendation of the drafter. See Open Records Decision No. 559 (1990).

We agree that section 552.111 applies to portions of the submitted documents and have marked the records accordingly. We note that you submitted several documents prepared by third parties. However, as you have not established that the preparation of these documents was at TNRCC's request, we cannot conclude that section 552.111 is applicable.

Section 552.107(1) states that information is excepted from required public disclosure if

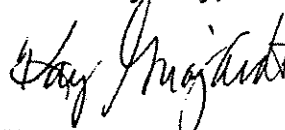
it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

This exception protects the essence of the confidential relationship between attorney and client from the disclosure requirements of the Open Records Act, that is, only the details of the substance of attorney-client communications. Consequently, section 552.107(1) applies only to information that reveals attorney advice and opinion or client confidences. See *id.* We believe that in this case the protection of section 552.107(1) is coextensive with that of section 552.111.

You also say that the records may constitute attorney work product. This office recently stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must first show that the work product was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). Open Records Decision No. 647 (1996) at 4, 5. TNRCC has failed to show that the requested records were created for trial or in anticipation of litigation under the *National Tank* test. Accordingly, TNRCC may not withhold the records from disclosure as attorney work product under section 552.111.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 102135

Enclosures: Marked documents

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(w/o enclosures)